



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Ms. Rosalinda Garcia
Assistant County Attorney
Harris County Attorney's Office
1001 Preston, Suite 634
Houston, Texas 77002-8924

OR95-1187

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 36848 (formerly ID# 15494).

The Harris County Sheriff's Office (the "sheriff's office") received a request for a copy of the "entire unsealed portion" of a deputy sheriff's personnel file. As a threshold matter, the sheriff's office received a request for information pursuant to chapter 552 of the Government Code on March 2, 1992. You requested a decision from this office by letter dated March 26, 1992. Consequently, you failed to request a decision within the ten days required by section 552.301(a) of the Government Code.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information that the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body may overcome this presumption only by showing that the information is confidential or that an exception designed to protect the interest of a third party is applicable. *See id.*; Open Records Decision No. 552 (1990).

You ask whether any portion of the personnel file is confidential under section 157.904 of the Local Government Code and, therefore, is excepted from required public disclosure by section 552.101 of the Government Code. Section 552.101 protects

“information deemed confidential by law, either Constitutional, statutory, or by judicial decision.” Section 157.904 of the Local Government Code governs the creation and maintenance of permanent personnel files by the sheriff’s department of a county with a population of 2,000,000 or more. Section 157.904 requires the sheriff’s department to maintain a permanent personnel file for each employee of the department and prescribes the contents of the file. It provides for the removal of records relating to disciplinary action taken against the employee which is found either to have been taken without just cause or to be based on insufficient evidence. Local Government Code § 157.904(e). The provision also requires employees to be notified of the addition to the file of negative records of employee misconduct or other notations of negative impact, affords employees an opportunity to respond to the negative record in writing, allows employees to have the response included in the file, and grants employees the right to receive copies of records in the file. *Id.* § 157.904(f),(g).

Section 157.904 also addresses the release of information from the file. Specifically, it states that

[t]he sheriff or the sheriff’s designee may not release an employee record or other information contained in an employee’s permanent personnel file without first obtaining the employee’s written permission, unless the release of the record or information is required by law.

Id. § 157.904(h). You inform us that since the sheriff has not received the deputy’s written permission to release any information from the file, he has declined to release the information requested. You seek a ruling from this office about whether the deputy must give written consent before the sheriff releases the requested information.

You contend that section 157.904 should be construed in harmony with chapter 552 of the Government Code to require an employee’s written consent to disclosure only in instances when information is otherwise excepted from public disclosure under section 552.101, 552.103(a), 552.117, or 552.119. For the following reasons, we conclude that section 157.904 does not make information confidential. We believe that based upon the statutory scheme set forth in 157.904, the sheriff’s office must obtain the deputy’s written consent to the public disclosure of any information that would be covered by a “permissive” exception under chapter 552 of the Government Code.¹ Regarding other information in the personnel file, the sheriff’s office, may not release information deemed confidential by law except in accordance with section 552.023 of the Government Code or the statute making the information confidential.

¹Permissive exceptions are those exceptions found in subchapter c of chapter 552 of the Government Code which allow information to be withheld but do not make information confidential for purposes of section 552.352. Examples of permissive exceptions are sections 552.103 (information relating to pending or anticipated litigation), 552.104 (information that would give advantage to competitors or bidders), and 552.108 (information relating to law enforcement and prosecution).

Though this office has not construed section 157.904 in the context of chapter 552 of the Government Code, this office has interpreted section 143.089 of the Local Government Code, a provision substantially identical to section 157.904.² *See* Open Records Decision No. 562 (1990). (143.089 addresses police officers' and fire fighters' personnel files required to be maintained by cities). Section 143.089 contains a provision limiting access to information in a personnel file maintained by the civil service department:

(f) The director [of the civil service department] or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, *unless the release of the information is required by law.* (Emphasis added.)

Local Government Code § 143.089(f). After reviewing the legislative history of section 143.089, this office concluded that the italicized language above signaled the legislature's intent that chapter 552 of the Government Code was to apply to personnel files compiled pursuant to subsection (a). The provision thus was read to prohibit the release of information in the file without the employee's written permission "unless disclosure is required by the Open Records Act or other law." Open Records Decision No. 562 at 5-6.³ It forbids public disclosure

only in situations not governed by the Open Records Act or other laws that require disclosure. For example, there may be occasions where particular information in a personnel file would be excepted from disclosure under the Open Records Act, but the [officer for public records] may wish to waive the exception and make such information public. In such instances, section 143.089 would require the [employee] to give his written consent to disclosure of the information before its release.

²The primary difference between the two provisions is that section 143.089 authorizes the creation of two separate personnel files, one by the director of the civil service commission and one by the employing department. *See* Local Gov't Code § 143.089(a), (g). The sheriff's department personnel file compiled pursuant to section 157.904 is equivalent to the civil service personnel file authorized by section 143.089(a). The second kind of personnel file authorized by section 143.089(g) was intended to allow a department to assemble information which may not be placed in the civil service file. The act places severe restrictions on the dissemination of information from the department's personnel file. *See City of San Antonio v. Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied) (addressing confidentiality of files created pursuant to section 143.089(g)); *see also* Open Records Decision No. 562 (1990). A provision authorizing a sheriff to compile a file similar to the department personnel file authorized under section 143.089(g) was deleted from the bill adopting section 157.904 prior to its enactment. *See* House Comm. on County Affairs, Bill Analysis H.B. 1289, 72d Leg. (1991).

³Thus, as interpreted in Open Records Decision No. 562 (1990), the employee consent requirement is relevant only to information that otherwise is not subject to required public disclosure. It has no application to information that the Open Records Act or other law requires to be disclosed.

Id. at 6. Information in the file therefore is not removed from scrutiny under chapter 552 of the Government Code and may only be withheld from public disclosure if it falls within a specific exception provided in subchapter c of chapter 552 of the Government Code. *Id.* at 8.

Given the virtual identity of section 157.904 to section 143.089 we conclude that section 157.904(h) must be construed to prohibit disclosure of personnel file information only when the information in question is excepted under subchapter c of chapter 552 of the Government Code. In those instances when the sheriff's office decides to waive an applicable exception and make certain information public, must it obtain the written permission of the employee prior to releasing the information, unless the information is made confidential by law.⁴

You advance no arguments that the information in the deputy sheriff's personnel file is protected by any of the exceptions contained in subchapter c of chapter 552 of the Government Code. Ordinarily, the failure to assert exceptions to disclosure would result in a waiver of permissive exceptions. *See* Open Records Decision Nos. 522 (1989), 473 (1987). As noted above, however, we interpret section 143.089 and 157.904 to prevent a governmental body's waiver of permissive exceptions without employee consent. These statutes embody the legislative intent to grant these types of employees a level of control over public disclosure of personnel file information. It would be inconsistent with this policy to conclude that permissive exceptions may be waived merely by the governmental body's failure to assert any exceptions to disclosure.

In view of the legislative policy, we believe that section 157.904 requires a governmental body to make a good faith effort to determine whether information requested from a personnel file compiled under this provision may have been excepted from disclosure under chapter 552 of the Government Code by a discretionary exception.

⁴You suggest that section 157.904 allows the sheriff's department to release information deemed confidential under section 552.101, among other provisions. This is incorrect. Section 552.352(a) forbids a governmental body from distributing information deemed confidential under section 552.101. Section 552.352(b) provides a criminal penalty for violations of 552.352(a). Section 552.023 grants a person a special right of access to information about themselves that is excepted from disclosure by laws designed to protect the person's privacy interests. *See* Open Records Decision No. 565 (1990). However, many statutory confidentiality provisions protect governmental interests that are not related to an individual's privacy interests. A person does not enjoy a special right of access to such information under subsection c of section 552 of the Government Code. We detect no legislative intent in section 157.904 to authorize an employee to waive confidentiality provisions that protect governmental interests or to authorize the sheriff's department to release information which is confidential for reasons not related to the employee's privacy. Consequently, we conclude that the consent requirement of section 157.904 cannot override the sheriff's legal duty to protect from public disclosure information that is made confidential by laws designed to protect governmental interests.

If information in the file could have been withheld pursuant to a permissive exception to disclosure, it may not be released without the employee's written consent.⁵

We have examined the information in the personnel file. The file has two documents that contain information that is confidential, and, therefore, must be withheld pursuant to section 552.101 of the Government Code. These two documents, which we have marked, were prepared by physicians. The documents are medical records for purposes of the Medical Practices Act because they are "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). See Attorney General Opinion JM-229 (1984). Medical records are confidential and may not be disclosed except as provided by the act. V.T.C.S. art. 4495b, § 5.08(b). The Medical Practices Act supplies eight exceptions that allow disclosures of confidential medical information in other than court or administrative proceedings. *Id.* § 5.08(h). From the information provided to this office, none would appear applicable to the medical records in the personnel file. Furthermore, there is no indication that the requestor is acting as the authorized representative of the deputy sheriff so as to permit the release of the records pursuant to section 552.023 of the Government Code. Accordingly, the sheriff's department may not release these documents.

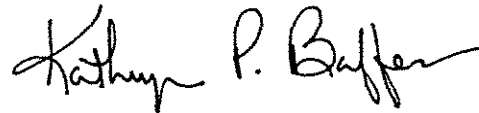
Another document in the file consists of a letter from a chiropractor explaining an injury suffered on the job. Article 4512b, V.T.C.S. regulates the practice of chiropractic in Texas, and it does not supply a privilege of confidentiality comparable to the Medical Practices Act. Moreover, we do not believe the information is excepted by either common-law or constitutional privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (test for common-law privacy under chapter 552 of the Government Code); Open Records Decision No. 343 (1982) (constitutional privacy protects information relating to marriage, procreation, contraception, family relationships, or child rearing and education). Accordingly, the sheriff must release this information.

The file also contains two offense reports that reflect the home address and home telephone number of the deputy sheriff. The address and telephone number must be withheld from disclosure under section 552.117 of the Government Code unless the deputy sheriff gives written permission to release this information from the personnel file. Local Gov't Code § 157.904(h). See generally Open Records Decision No. 532 (1989) (discussing application of section 552.117).

⁵The availability of a permissive exception to disclosure usually will depend on the facts and circumstances of a given case. Also, with the exception of information deemed confidential pursuant to section 552.101, this office cannot invoke exceptions on behalf of a governmental body under chapter 552 of the Government Code. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information discloses the applicability of an exception on its face, this office cannot make the determination required by section 157.904.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Kathryn P. Baffes". The signature is fluid and cursive, with the first name "Kathryn" being more prominent than the last name "Baffes".

Kathryn P. Baffes
Assistant Attorney General
Open Records Division

KPB/rho

Ref: ID# 15494

Enclosures: Marked documents

cc: Mr. Lynwood Moreau
President
Harris County Deputy Sheriff's Union
2600 Hamilton, Suite 154
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(w/o enclosures)